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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 15-4104

MICHELLE A. CHRYSTAL, APPELLANT,

v.

ROBERT A. McDONALD,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before GREENBERG, *Judge*.

MEMORANDUM DECISION

*Note: Pursuant to U.S. Vet. App. R. 30(a),
this action may not be cited as precedent.*

GREENBERG, *Judge*: The appellant, Michelle A. Chrystal, widow of Robert A. Chrystal, appeals through counsel an October 6, 2015, Board of Veterans' Appeals (Board) decision that denied a disability rating in excess of (1) 30% for post-traumatic stress disorder (PTSD) from January 20, 1989, to January 30, 1994, and (2) 70% for PTSD, from February 23, 1994, to March 26, 1997, all for accrued benefits purposes.¹ Record (R.) at 2-26. The appellant argues that the Board (1) relied on an inadequate 1991 VA medical opinion; (2) clearly erred in determining that the veteran's depression symptoms were not clinically assessed; (3) clearly erred in failing to apply a 1997 VA retrospective opinion; (4) clearly erred in finding that a 1997 non-service-connected pension decision was not binding for purposes of rating the veteran's service-connected conditions; (5) clearly erred in denying a total disability rating based on individual unemployability from January 1989 to March 1997; or, alternatively, (6) failed to substantially comply with a February 2015 joint motion for remand (JMR). Appellant's Brief at 9-21. For the following reason, the Court will vacate the October 2015 Board decision and remand the matter of PTSD for all periods on appeal for

¹The Board also granted a temporary total evaluation for hospitalization for his service-connected mental disability from November 29, 1994, to December 29, 1994. The Court will not disturb this favorable finding. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007)

readjudication.

Justice Alito noted in *Henderson v. Shinseki* that our Court's scope of review in this appeal is "similar to that of an Article III court reviewing agency action under the Administrative Procedure Act, 5 U.S.C. § 706." 562 U.S. 428, 432 n.2 (2011); *see* 38 U.S.C. § 7261. The creation of a special court solely for veterans, and other specified relations such as their widows, is consistent with congressional intent as old as the Republic. *See Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n., 1 L. Ed. 436 (1792) ("[T]he objects of this act are exceedingly benevolent, and do real honor to the humanity and justice of Congress."). "The Court may hear cases by judges sitting alone or in panels, as determined pursuant to procedures established by the Court." 38 U.S.C. § 7254. Accordingly, the statutory command of Congress that a single judge may issue a binding decision, pursuant to procedures established by the Court, is "unambiguous, unequivocal, and unlimited." *Conroy v. Aniskoff*, 507 U.S. 511, 514 (1993); *see generally Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

The appellant is the widow of a Vietnam veteran who served on active duty in the U.S. Army from January 1968 to June 1971, as a Hawk Missile fire control operator and power generator equipment repairman. R. at 3659. In January 1989, the veteran filed for benefits based on service connection for PTSD, drug use, and "emotional problems from Vietnam." R. at 3714-17. In August 2004, the appellant was granted service connection for a psychiatric disorder, including PTSD and drug abuse. R. at 1228-35.

In March 1997, the appellant underwent a VA mental examination, wherein the examiner found that

part of the problem with his prior evaluations, follow-up and connection to treatment has been the severity of his depression at times to the point that he has been unable to get out of bed or out of the house for long periods of time, both as a result of his major affective, disorder and in conjunction with the level of anxiety and stress in relation to being out in public which appears to be the result of his degree of PTSD.

R. at 3057-58. The examiner reviewed VA, Social Security, and private treatment records dating back to as early as 1988. *See* R. at 3056-61. The examiner found that the veteran suffered "from a variety of disorders the combination of which have seriously impaired his ability to function over a long period of time, and as noted, significantly interfered with both his ability to maintain a

connection with treatment or comply with plans for evaluation and also affected, I think, significantly the ability of some of his examiners to provide an objective review and synthesis of his symptoms."

R. at 3060. The examiner concluded:

I would place in the 25-35 [Global Assessment of Function (GAF) score] range over the past year when not in jail. I would say that for his rating of PTSD, he would be in the 45 range at various times, including the last year. For his major depression I would say 25 for the majority of the last five years. For his polysubstance abuse, 45-55 at various times over the last five to ten years. I would expect that he be rated according to the above.

R. at 3061. The veteran was awarded a 100% disability rating as of the date of this examination.

R. at 845. In June 2008, the veteran died, and the appellant was subsequently substituted for accrued benefits purposes. *See* R. at 3.

In February 2015, the Court granted a JMR, wherein the parties agreed that the Board, on remand, should (1) determine whether the veteran's depression was related to his PTSD or service and (2) address the March 1997 VA medical opinion and apply it retroactively. R. at 361-63.

In October 2015, the Board issued the decision currently on appeal, wherein it denied higher disability ratings for the veteran's psychiatric disability for any period on appeal. R. at 2-26. In reaching this determination, the Board found that it could not separate the effects of the veteran's PTSD, substance abuse disorder, and major depression, and therefore considered all of his psychiatric symptoms to be service connected. R. at 19. The Board acknowledged that the

March 1997 VA examiner's report suggests that the Veteran's disability was greater than compensated prior to January 30, 1994, and indicates that the lack of relevant mental health treatment and findings during the appeal period were due to his depression and an inability to get out of bed. The examiner cited symptoms such as impairment of thought processes, concentration, and long-term memory along with periods of inability to maintain personal hygiene, suicidal thoughts, and probable homicidal ideation. The examiner surmised that the Veteran's GAF score had ranged from 25 to 35 *over the previous five years, which would have encompassed the period back to March 1992.*

R. at 20 (emphasis added). However, the Board found that, because the March 1997 VA examiner "did not explicitly identify at which point during the appeal period [suicidal ideation] manifested," the appellant was not entitled to a disability rating in excess of 30% for the period of January 1989 to January 1994. R. at 21. The Board also stated without further explanation that "the March 1997

VA examination does not itself establish that a rating in excess of 70[%] was warranted from February 23, 1994 to March 26, 1997." R. at 23.

The Court concludes that the Board failed to ensure substantial compliance with the February 2015 JMR. *See Dyment v. West*, 13 Vet.App. 141, 146-47 (1999) (it is substantial compliance, not absolute compliance, that is required). The parties instructed the Board to address the retroactive findings of the March 1997 VA examination. R. at 361-62. Although the Board acknowledged the March 1997 examiner's findings that the appellant's condition had been significantly worse than documented since March 1992, the Board provided no rationale for rejecting the retroactive opinion, other than to find that the examiner did not specifically state when the veteran was suicidal. However, it is unclear why the Board signaled out a single symptom when the March 1997 VA examiner described a myriad of other symptoms, including an inability to sleep, an inability to concentrate, needing to write everything down, general hyperresponsiveness to unexpected stimuli, severe mood instability, or "volition of any kind." R. at 3058-60. Further, the Board found the appellant's depression to be service connected and that the March 1997 VA examiner found GAF scores of 25 since March 1992, but failed to explain why the appellant was not entitled to a higher rating for depression for this entire period. Finally, the Board failed to address the March 1997 VA examiner's statements that previous evaluations of the veteran may not have yielded valid test results. *See* R. at 3058-60. Remand is required for the Board to ensure compliance with the February 2015 JMR. *See Stegall v. West*, 11 Vet.App. 268, 271 (1998) (the Board errs when it fails to ensure compliance with the terms of a remand).

Because the Court is remanding the appellant's claim to comply with a previous remand, it will not address his remaining arguments. *See Dunn v. West*, 11 Vet.App. 462, 467 (1998). On remand, the appellant may present, and the Board must consider, any additional evidence and arguments. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). This matter is to be provided expeditious treatment on remand. *See* 38 U.S.C. § 7112; *see also Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n., 1 L. Ed. 436 (1792) ("[M]any unfortunate and meritorious [veterans], whom Congress have justly thought proper objects of immediate relief, may suffer great distress, even by a short delay, and may be utterly ruined, by a long one" (internal quotation marks omitted)).

Based on the foregoing reason, that part of the October 6, 2015, Board decision on appeal

is VACATED and the matter is REMANDED for readjudication.

DATED: November 30, 2016

Copies to:

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